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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 176

MARYDALE PRODUCTS COMPANY, INC.,
Petitioner-Respondent Below,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Petitioner Below.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of MARYDALE PRODUCTS COMPANY, INC., a Louisiana corporation, hereinafter sometimes referred to as Petitioner, respondent in the proceeding for enforcement of an Order of the National Labor Relations Board, respectfully avers that

A.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported in National Labor Relations Board v. Marydale Products Company, Inc., 311 F. 2d 890.

B.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked on the ground that the Order rendered by the National Labor Relations Board on October 20, 1961 and ordered enforced by the United States Court of Appeals for the Fifth Circuit by a decree entered on March 28, 1963, pursuant to an opinion rendered on January 3, 1963, directing the enforcement of the Order of the Board, a rehearing requested by petitioner herein having been denied on March 13, 1963, is erroneous and contrary to the applicable law and the evidence taken at the hearing held by the National Labor Relations Board, and is violative of the rights of Petitioner under the Constitution of the United States. . . .

The statutory provisions relied on to confer jurisdiction on this Court is 28 U.S.C. 1254 (1).

C.

QUESTIONS PRESENTED

The questions presented by the decision of the Court of Appeals for the Fifth Circuit and this application are:

1) Does the National Labor Relations Act require employees to advise their employer of a grievance before staging a walkout?

2) Are employees who voluntarily leave their jobs without first informing their employer of any grievance entitled to the benefits of the National Labor Relations Act?

3) What constitutes permanent replacement of an economic striker?

4) What obligation has been placed on a Court of Appeals by Congress by 5 U. S. C. A. Section 1009 (e) with respect to the review of the Record for the purposes of determining if the Order entered is supported by substantial evidence?

5) Does an employer have the right to discharge an employee whose actions are interfering with the orderly operations of the employer's business?

6) May an employer be constitutionally denied the right to cross-examine those claiming back wages?

7) May the National Labor Relations Board issue an Order completely general in its terms, directing the payment

of back wages to employees without, in any manner, indicating how such back pay is to be computed, which employees are entitled to preference in being paid back wages, or the time for which the employees are entitled to back pay, leaving all questions regarding the payment of back pay to be determined at the compliance stage of the proceeding.

D.

STATUTES INVOLVED

The following statutes are involved in this matter:

Labor Management Relations Act, 1947 (National Labor Relations Act) 29 U. S. C. Section 141, et seq.

Administrative Procedure Act, 5 U. S. C. Section 1001, 1009 (e).

E.

STATEMENT OF THE CASE

Petitioner, in 1959, operated at Oak Grove, Louisiana, a plant for the processing and canning of sweet potatoes. The sweet potato season is a brief one, and the canning of sweet potatoes is a seasonal industry of short duration. Certain employees of petitioner, without having given any notice of grievances to petitioner, stopped work, engaged in a melee or mass demonstration within the plant and then walked out. Prior to the demonstration, disturbance and walkout no notice of grievances of any kind or character had been

given by any of the employees to their employer, petitioner herein. The officials of petitioner had never been advised by any employee of any grievance or complaint, nor had any demand or request been made upon the management of petitioner for any increase in pay, improvement in working conditions, or correction of any unsatisfactory matter. No employee or representative of a labor organization had approached the management with the request for recognition of a union. In the words of one of the witnesses for General Counsel, the walkout occurred while "they was working". (J. A. 55)

Subsequent to the walkout, representatives of a Union contacted the management of petitioner to discuss Union recognition. The walkout occurred on a Saturday morning and the plant closed immediately after the walkout, and remained closed until the following Wednesday morning. Sufficient of the old employees together with applicants for jobs reported to work on Wednesday for the plant to resume operations. On Saturday the Union representative advised the management of petitioner that the "strike" was being terminated and requested that those who had participated therein be permitted to apply for employment. At the time, petitioner had far more employees than it needed to carry on its operations. The so-called "strikers" thereafter applied for work; some of them being hired when job vacancies occurred.

Petitioner was charged by the National Labor Relations Board with having provoked an unfair labor strike by locking out its employees on Monday and Tuesday, and a hearing was held by a trial examiner of the National Labor Relations Board on this charge. Thereafter, the trial examiner

found that Petitioner had not locked out its employees or been involved in an unfair practice strike, but that petitioner had been guilty of unfair labor practices in that it failed to rehire some of the employees who had walked out, which employees were considered by the Examiner as economic strikers. The National Labor Relations Board adopted the report of the trial examiner with modifications, and directed that sixty-two employees be rehired and paid back wages.

The National Labor Relations Board applied to the United States Court of Appeals for the Fifth Circuit for enforcement of its Order and petitioner filed an answer to the petition of the Board, asking that the Order be set aside, specifying many errors committed by the Board.

F.

JURISDICTION OF COURT OF APPEALS

The Court of Appeals was vested with jurisdiction in this matter under Section 10 (e) of the Labor Management Relations Act, 29 U. S. C. Section 141, 160 (e).

G.

REASONS FOR ALLOWANCE OF WRIT

I. Failure of Employees to Notify Employer of Demands before Walking Out.

We respectfully submit that it is extremely important as a matter of public policy that a clear cut decision be ren-

dered by this Honorable Court specifically declaring that it is the duty of employers and employees alike to abide by the letter and spirit of the National Labor Relations Act, and that employees must give notice to their employer of their grievances or demands so as to avoid labor conflicts wherever possible, and by its decision in this matter direct to the attention of all employees the necessity for them, as well as Management, to comply with all of the objects and purposes of the law.

The National Labor Relations Act was enacted for the purpose of avoiding labor difficulties and to encourage collective bargaining. In Section I, it is set out in the Declaration of Policy that industrial strikes can be avoided or substantially minimized if employers, employees and labor organizations would each recognize under law one another's legitimate rights in their relations with each other. The Statute further declares that it is the purpose and policy of the law, to prescribe the legitimate rights of both employees and employers, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to define and proscribe practices on the part of labor and management which affect commerce, and to protect the rights of the public.

It is quite obvious that Congress did not intend to lay down arbitrary restrictions on either labor or management, but was endeavoring to set out a procedure which would minimize and avert labor difficulties whenever possible. In carrying out this purpose, the Act granted to employees the right to self organization, to form labor unions and to engage in concerted activities for the purpose of collective bargaining.

The statute specifically sets out the orderly and peaceful procedures for preventing the interference by either the employer or employee with the legitimate rights of the other. The employer is required to respect the rights granted to employees and the employees are expected to follow the procedures set out in the Act to obtain recognition of their rights. If the employee fails to give notice to his employer of a grievance or demand, the employer cannot possibly take action to satisfy the employee and industrial strife is inevitable. Both employer and employee have responsibilities under the Act and the orderly process envisioned by the statute necessarily begins with notification by the employees to their employer of whatever complaint or grievance they may have, and the desire to meet with the employer to discuss their problems, whether it be with regard to wages, conditions of employment, representation by an organization chosen by the employees, or otherwise.

We respectfully ask that this Honorable Court, by refusing to permit the recovery of back wages by the employees involved in the unannounced walkout, enforce the provisions of the Act with respect to the necessity of employees notifying their employer of any grievance they may have before taking unilateral action.

The employees involved in this controversy flouted the Act and walked out without giving to their employer any intimation whatsoever of any complaint, desire to have a discussion of grievances or wish to be represented collectively. The testimony taken showed that the General Manager, supervisory personnel and the employees other than those who engineered the walk-out, were all taken by com-

plete surprise by the actions of those initiating the disturbance created in the plant and the subsequent walkout.

The Court below in its opinion in discussing the argument of petitioner on this point cited the Washington Aluminum case (National Labor Relations Board v. Washington Aluminum Co., 370 U. S. 9, 8 L. ed. 2d 298, 82 S. Ct. 1099), and held that individual workers of Petitioner herein had protested the wage situation and had asked for a wage increase prior to the walkout. We respectfully submit that the Court erred in reaching its conclusion. In our opinion, the Record, as a whole, reflects, as we have previously stated, that the walkout came as a complete shock to the Management and that demands had not been made for a wage increase prior to the walkout. The contention was attempted to be made by the Board that the employees were surprised at not being paid time and one-half for overtime as had been done the prior year, and complained to the General Manager, but the Record clearly shows that the employees had just completed their first work week of the season at the time of the walkout, and consequently it would have been most unusual for any of the employees to have discussed the wage situation with Management prior to the unannounced walkout.

In the Washington Aluminum case, this Court found that the walkout was a concerted activity protected by the Act because there had been a running dispute for some time between the employees and the company over the heating of the shop on cold days, which dispute culminated in the decision of the employees to act concertedly in an effort to force the company to improve the conditions of their employment. In effect, the Court found that there had been a

notification of grievances by the employees to the employer, thereby inferentially holding that notice was essential, for, otherwise, it would have been unnecessary for the Court to discuss this point. The decision of the Washington Aluminum case is therefore not determinative of the issue.

We respectfully urge that this Court enunciate unequivocally that an employee or group of employees to be entitled to the protection of the National Labor Relations Act, must first give notice of their grievances to their employer to afford him an opportunity to remedy the complaint, before taking such precipitate action as a walkout or strike.

II. Are Employees Who Voluntarily Leave Their Jobs Without Notice Entitled to the Benefits of the National Labor Relations Act?

We respectfully submit that since the employees involved in this matter acted in contravention of the express provisions of the Act by failing to notify the employer of any grievance they may have felt they had, their action in walking out was not a protected activity. The Circuit Court in upholding the award of back pay overlooked its decision in N. L. R. B. v. Marshall Carwheel & Foundry Co., 218 F. 2d 409, wherein the Court held that where a union had timed its strike without prior warning, those involved were not entitled to the protection of the Act.

The decision of the Court below is in conflict with that of the Court of Appeals for the Second Circuit, which Court held in National Labor Relations Board v. Jamestown Veneer & Plywood Corp., 194 F. 2d 192, that a work stoppage resulting from the walkout of several employees was not a

protected activity and the employees who had engaged therein were not entitled to the remedies of the Act.

The Court of Appeals for the Third Circuit has taken the same position; see National Labor Relations Board v. Condenser Corporation, 128 F. 2d 67, 73, which case was cited with approval by this Court in International Union v. Wisconsin Employment Relations Board, 336 U. S. 245, 249, 69 S. Ct. 516, 93 L. ed. 651.

The decision of the Circuit Court herein involved is at variance with its own prior rulings and those of other circuits and this Honorable Court should therefore issue a writ herein and correct the erroneous holding of the Circuit Court.

III. What Constitutes Permanent Replacement?

The Court of Appeals in this case has held that the National Labor Relations Board correctly found that the alleged discriminatees, who were considered by the Board as economic strikers, had not been permanently replaced. This ruling is not only at variance with that of the courts of other circuits but raises the very important question as to what constitutes "permanent replacement". It is conceded that at the time the so-called "strike" was called off Petitioner had in its employ far more workers than its usual complement. Consequently, at the time the so-called discriminatees applied for work, there were no job vacancies and we respectfully submit the so-called discriminatees had therefore been permanently replaced. To hold otherwise would place an employer in an impossible position from a practical standpoint. The employer would be left entirely in the dark as

to when he had the right to consider that an employee had been permanently replaced.

The only practical time for the determination as to whether an employee has been permanently replaced is the moment he applies for work. If there is no job available for the employee at that time, he has been replaced and this Honorable Court should so rule.

The Court of Appeals has enunciated a new and erroneous doctrine by upholding the observation of the Board that the work force of petitioner had substantially increased AFTER the strike, and therefore the Record did not warrant an inference that the workers had been permanently replaced. We respectfully submit that an employer has the right to know definitely whether or not he is under a legal obligation to hire an economic striker, and we urge that if at the time the employee applies for work there is no job vacancy such employee has been replaced regardless of whether or not jobs become open thereafter.

As the Court of Appeals for the First Circuit held in Simmons, Inc. v. National Labor Relations Board, 315 F. 2d 143, 148. Petitioner was within its rights in treating the alleged discriminatees as applicants for work. Its only obligation was not to discriminate against them because of their union affiliation. We submit that the alleged discriminatees had been permanently replaced since there were no jobs available for them and the Court of Appeals erred in ruling to the contrary.

IV. The Obligation of a Court of Appeals under the Administrative Procedure Act.

Congress, in the Administrative Procedure Act, 5 U. S. C. Section 1009 (e), placed the duty on the appellate courts to set aside agency action where such action was unsupported by substantial evidence. A Circuit Court is thus directed to analyze and determine if the Order rendered by the Administrative Agency is based on "substantial evidence". Apparently, Congress considered that an appellate court, when passing upon the correctness of an order of an administrative agency, should, before directing that it be enforced, carefully analyze and weigh the evidence in the record as a whole, and determine if the weight and substantiality thereof support the order. An appeal from the decision of an administrative agency would not afford an effective remedy if the appellate body merely determined that there was evidence in the record to support the ruling of the administrative agency. We must necessarily assume that administrative agencies do not act entirely arbitrarily when entering an order and such agencies undoubtedly rely on evidence of some kind. However, Congress in its wisdom considered it necessary to grant the right of appeal from the determination of an administrative agency and required the Courts of Appeal to determine if the holding was supported by substantial evidence.

We respectfully submit that the evidence taken as a whole does not show that the Board carried its burden of proof of establishing by a substantiality of the evidence that Petitioner had failed to hire the former employees because of their union affiliation. The Circuit Court therefore erred in directing the enforcement of the Order. The rul-

ing of the Court of Appeal on this issue is in conflict with its own holding in the cases of National Labor Relations Board v. Crosby Chemicals, Inc. 274 F. 2d 72, and National Labor Relations Board v. Florida Steel Corporation, 308 F. 2d 931; the ruling of the Circuit Court of Appeals for the Seventh Circuit in Portable Electric Tools, Inc. v. National Labor Relations Board, 309 F. 2d 423 and the pronouncement of other Courts of Appeals in innumerable other cases.

As this Honorable Court held in Universal Camera Corporation v. National Labor Relations Board, 340 U. S. C. A. 474, 71 S. Ct. 456, 95 L. ed. 456, the Administrative Procedure Act requires that the appellate court in determining the substantiality of evidence take into account whatever in the record fairly detracts from its weight. We do not believe that the Court of Appeals followed this principle and for this reason a writ of certiorari should be granted.

V. Right of an Employer to Discharge an Employee Whose Actions are Interfering with the Orderly Conduct of its Business.

The Order issued against Petitioner herein, which the Court of Appeals directed to be enforced, commanded the employer to pay back wages to four employees, among others, who were laid off because Management considered that their presence in the plant was causing confusion and delaying the plant's operation. The right to lay off an employee is the prerogative of every employer; the only restriction on the employer being that in doing so he act for a just cause, and not merely to punish a union adherent. The Court of Appeals in directing the Order of the Board to be enforced as to four employees, to-wit, Lillie Smith, Margar-

et Smith, Zora McLemore and Rita Layton acted contrary to the holdings of many of the Court of Appeals, since these employees were laid off because Management considered that the orderly conduct of its business required such action.

The Court of Appeals in not recognizing the right of the employer to discharge an employee for cause went contrary to the holding of the Court of Appeals for the Seventh Circuit in the case of Portable Electric Tools, Inc. v. National Labor Relations Board, 309 F. 2d 423; that of the Court of Appeals for the Sixth Circuit in National Labor Relations Board v. Superior Tool and Dye Co., 309 F. 2d 692; its own rulings in National Labor Relations Board v. Florida Steel Corporation, 308 F. 2d 931 and National Labor Relations Board v. McGahey, 233 F. 2d 406 and the holding of the Board itself in the case of Stuart F. Cooper Co., 136 National Labor Relations Board No. 8, 1962 C C H National Labor Relations Board Sec. 10987, wherein the Board held that where production was being interfered with, the employer was justified in meting out a layoff to those causing the trouble, although such employees were union proponents.

VI. Unconstitutional Denial of Due Process to Petitioner.

The Board ordered the payment of back wages to sixty-two former employees of petitioner herein, although there is not a scintilla of evidence in the Record to support the charge of discrimination and the award of back pay as to FORTY of these employees.

At the hearing before the Trial Examiner, there was of-

fered in evidence over the objection of Petitioner herein, applications for employment purportedly signed by forty employees who were not called as witnesses at the hearing. It was urged that because the Record contained the forty applications, each and every one of the forty individuals (who supposedly signed the applications) had been refused employment because of their union activities. Petitioner herein was not afforded the opportunity to cross-examine the forty individuals, or to determine in what way it was being charged with having discriminated against such individuals.

It is respectfully urged that Petitioner was deprived of its legal rights and was not afforded due process with respect to the award of back pay to said forty individuals in violation of the Fifth Amendment to the Constitution of the United States. The Circuit Court did not in its opinion discuss this contention of Petitioner herein, merely dismissing this argument and other contentions of Petitioner on the ground that they did not justify denying enforcement of the Board's Order.

Without attempting to be melodramatic, we insist that the fundamental right of Petitioner to due process was completely flouted insofar as the forty employees who did not testify are concerned.

VII. Is the Order of the National Labor Relations Board Properly Enforceable?

The Board, in its Order, acknowledged that some of the strikers *may* have been returned to work, but declared that it was "unable to determine whether they were accorded

all rights and privileges to which they were entitled, and it may be *assumed* that they did not receive back pay for the period from the date following their applications on which jobs became available to the date of their re-employment". (italicizing ours) The Board therefore decided it would leave the determination of such matters to be handled at the compliance stage of the proceedings.

It has always been conceded in this proceeding that at the time the overwhelming majority of those awarded back pay applied for work Petitioner had no job vacancies, but on the contrary had far more employees than it needed. There are several definite categories of employees involved in this proceeding. Assuming, but not admitting, that jobs became available after the so called discriminatees applied for work and were not then employed because there were no job vacancies, we submit that the Trial Examiner, the Board and the Court of Appeals should have attempted to determine in what categories jobs became vacant, when such jobs became available and which employees were entitled to those jobs.

Since all of the issues presented with respect to the payment of back pay are left to be handled at the compliance stage of the proceeding, the Board necessarily must have retained jurisdiction to be exercised at a later date, which action is improper and will result in this matter being unnecessarily prolonged. We urge that the decree of the Circuit Court directing the enforcement of the Board's Order is a judgment and will be entitled to all of the weight of a judgment. As pointed out by this Honorable Court in International Union v. Eagle-Picher Mining & Smelting Co., 325 U. S. 335, 65 S. Ct. 1166, 89 L. ed 1649, we are not at this

time "dealing here with an administrative proceeding. That proceeding has ended and has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act. The statute provides that if, in the enforcement proceeding, it appears that any further facts should be developed the court may remand the cause to the Board for the taking of further evidence, and for further consideration, (Section 10 (e)). But it is plain that the scheme of the Act contemplates that when the record has been made and is finally submitted for action by the Board, the judgment 'shall be final'."

We recognize that the Board may frame an Order which, by its terms may require modification, should conditions change, but we submit that in the interest of orderly and expeditious handling of matters of this character, the Order of the Board should be clear and should set out definitely the responsibility of the employer and the full extent thereof. If the Record, as made up, was not sufficiently complete for the Board to do so, then the proper procedure for the Board to have followed would have been to remand the case for additional evidence. Instead, the Board has found the employer to be guilty on an assumption, and has lightly left the many complicated questions arising therefrom to be determined at the compliance stage of the proceeding, and the Court of Appeals by directing that the Order be enforced has placed in effect a judgment of indefinite nature against Petitioner herein. Furthermore, such action must necessarily mean that after a compliance hearing has been held, the matter will then have to be submitted to the Board for review and decision and the employer will have its right to apply for redress to the Court of Appeals if it does not agree with the ruling

of the Board. Otherwise, Petitioner would be at the mercy of the Trial Examiner and the Board. The recitation of the proceedings which must be undergone in this matter in the future points up the error committed by the Board which the Court of Appeal did not correct. In order to insure the efficient, orderly and expeditious administration of cases of this character, this Honorable Court should issue the writ of certiorari and thereafter, if the Order of the Board be not set aside entirely, should order this case remanded to the Board with directions that it lay down the rules which must be followed in the determination of back pay. We further urge that this be done so that the Board may have the benefit of the Court's judgment as to the correctness of the procedure it is following in this case, and may avoid in the future the error that it has committed.

CONCLUSION

It is respectfully submitted that important questions of public policy and proper procedure as well as the violation of the rights of Petitioner are presented by this application for certiorari. We sincerely believe that it is important that the Court, at this time, enunciate the doctrine that the Labor Management Relations Act (National Labor Relations Act), requires both the employer and employee to follow the procedures of the statute in an attempt to avoid labor difficulties. In this case, the employees staged an unannounced walkout without having given any notice whatsoever to their employer of any complaint with respect to wages, hours of employment or working conditions. By so doing, they precipitated a shut-down of the plant. Obviously, it was their hope to coerce their

employer into granting their demands because of the shortness of the sweet potato canning season. Since the employees voluntarily elected to disregard the provisions of the National Labor Relations Act and not present any demand upon their employer before walking out, the employees are not entitled to the remedies afforded by the Act, and should not be permitted to collect back pay as awarded by the Board. Petitioner makes no contention with respect to that portion of the Order directing it to rehire those involved in this dispute, and Petitioner is entirely agreeable to re-employing those involved herein (and with apologies to the Court for going outside of the Record) we may say that Petitioner has offered to rehire all involved herein, and most of such former employees have reapplied for work and been given employment. We do urge, however, that these employees should not be rewarded for their refusal to abide by the letter and spirit of the National Labor Relations Act with payment of back wages.

2. We urge that employers be assured by this Court, that when an economic striker reapplies for work, and there is no job available such employee has been permanently replaced and the employer need not guess as to what period of time must elapse before it can consider that permanent replacement has taken place.

3. We also respectfully submit that it is important that this Court redefine the procedure appellate tribunals should follow under the Administrative Procedure Act in determining whether a decision of the National Labor Relations Board is supported by the substantiality of evidence. To this end a writ should be issued herein.

4. We also ask that the time honored right of an employer to discharge employees whose presence interferes with the orderly operation of the employer's business be recognized.

5. We further respectfully request that this Honorable Court review this matter, and determine whether the constitutional right of Petitioner to due process was violated by the rendition of the Board's Order directing the payment of back wages to forty employees on the sole basis of applications for re-employment purportedly signed by them.

6. We further submit that this Honorable Court should issue a writ of certiorari herein, and, in due course, if the Order of the Board be not set aside, that this Honorable Court should remand the case to the National Labor Relations Board with directions to refer the matter back to a trial examiner for additional evidence so that it may issue a proper Order fixing the rights of the employees held to be entitled to back wages and setting out definitely the responsibility of Petitioner with respect to the payment of such back wages, so that in the future there may be a more expeditious handling of cases of this character.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari may issue herein directed to the United States Court of Appeals for the Fifth Circuit commanding that Court to certify and to send to this Tribunal a full and complete transcript of the Record of all proceedings in the

National Labor Relations Board and of that Court in this case, to the end that the Order entered herein by the National Labor Relations Board may be reviewed, and that this Court may determine whether such Order is entitled to be enforced.

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CERTIFICATE OF SERVICE

The undersigned, of counsel for Marydale Products Company, Inc., Petitioner, hereby certifies that a copy of this petition has been served on counsel of record for the National Labor Relations Board and the Solicitor General of the United States by depositing a copy hereof addressed to each in a United States mail box, with first class postage prepaid in compliance with paragraphs 1 and 2 of Rule 33 of the Rules of the Supreme Court of the United States.

New Orleans, La. May _____ 1963.

_____

Attorneys for Marydale Products Company, Inc., Petitioner

APPENDIX "A"

STATUTES INVOLVED

The pertinent part of the Statutes involved in this case are as follows:

I.

NATIONAL LABOR MANAGEMENT ACT
29 U.S.C.A. SHORT TITLE: CONGRESSIONAL DECLARATION OF PURPOSE AND POLICY

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce can be avoided or substantially minimized if employer, employees, and labor organizations, each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define

and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, 3:17 p. m., E.D.T., c. 120 Section IV, 61 Stat. 136.

29 U.S.C.A. Section 158

UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

II.

5 U.S.C.A. Section 1009

ADMINISTRATIVE PROCEDURE ACT

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by

such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * *

Section 1009(e)

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) *unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute;* or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, Section 10, 60 stat. 243. (italicizing ours)

APPENDIX "B"

OPINION OF COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19551

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

MARYDALE PRODUCTS COMPANY, INC.,
Respondent.

Petition for Enforcement of an Order of the
National Labor Relations Board

(January 3, 1963)

Before HUTCHESON, WISDOM and GEWIN,
Circuit Judges.

HUTCHESON, Circuit Judge: This case is before the court on the petition of the National Labor Relations Board[1] for

[1]Filed pursuant to Sec. 10 (e) of the National Labor Relations Act, as amended, 29 USC Sec. 160 (e)

enforcement of its order[2] against Marydale Products Co., Inc., issued on October 20, 1961. The order is based upon the Board's findings that respondent: (1) violated Sec. 8 (a) (1) and (3)[3] of the Act by refusing, after an "economic strike", to reinstate fifty-seven employees because they participated in the strike and by discharging five other employees because they were union sympathizers or were related to strikers; and (2) violated Sec. 8 (a) (1) by threats of economic reprisal, surveillance, and interrogation. The order requires the respondent to cease and desist from those unfair labor practices, to reinstate the sixty-two discriminatees with back pay, and to post an appropriate notice.

Despite respondent's contentions to the contrary, the Board's findings of fact are supported by substantial evidence, in view of the record as a whole, including that evidence opposed to the Board's findings.[4] As to the finding that respondent discharged or refused to reinstate sixty-two employees in violation of Sec. 8 (a) (1) and (3), the evidence shows the following. The employees of respondent[5] made wage demands and began work stoppages. With the

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[2] 133 NLRB No. 118

[3] 29 U.S.C. Sec. 158 (a) (1) and (3). In pertinent part these sections provide as follows:

"(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . ."

[4] See Universal Camera Corp. v. N.L.R.B., 1951, 340 U.S. 474, 487-82.

[5] Respondent operates a sweet potato canning plant at Oak Grove, Louisiana. The dispute involved in this case occurred during the 1959 canning season.

assistance of a representative of a national union,[6] the workers organized pickets and subsequently organized a union. The representative from the national union and an employees' committee notified respondent that the strikers were ready to return to work, and the sixty-two workers involved in this case applied for reinstatement.[7] None of them were hired, although respondent continued to hire additional workers after the applications for reinstatement had been made.[8] The evidence shows, we believe, that respondent's general manager told the employees that respondent would close the plant before going union, and that no union member would be hired; and that he questioned employees who applied for reinstatement in regard to their union and strike activities. The Board was justified in finding that the workers were refused reinstatement because of their strike and union activity.

Respondent contends, however, that the workers were subject to replacement and had been, in fact, replaced before applying for replacement. Sixty-seven workers were hired during the course of the strike. The Board observes, however, that the work force had substantially increased during the course of the strike,[9] and, as we have already

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[6]The union involved is the United Packinghouse Workers of America.

[7]Most of the applications were filed on Saturday, Sept. 5, or Monday, September 7.

[8]From the end of the strike on September 5, to September 15, respondent hired 108 employees, comprised of twenty-two for the day shift and eighty-six for the night shift. Sixty-seven workers were hired during the course of the strike.

[9]Before the walkout on August 29, respondent employed 195 employees on a day shift and 128 on a night shift. At the time that the strike ended on September 5, respondent had a work force of 260 employees, working on a single shift (including four who had previously worked a night shift). The two-shift operation was resumed on September 10. The work force was then stabilized at about 190 employees for the day shift and 150 for the night shift.

noted, that respondent continued to hire workers after the strike was ended and after the application for reinstatement had been filed. On that basis, the record would certainly not warrant an inference that the workers had been permanently replaced. Respondent urges, however, that the Board failed, in considering this aspect of the case, to distinguish between the day and night shifts. The evidence shows, however, that the night shift was resumed only after the applications for reinstatement had been resumed, and that many of the sixty-two discriminatees expressed no preference as between the shifts or expressly stated that they would accept work on either shift. We therefore conclude that the Board was correct in finding that the discriminatees had not been permanently replaced.

As to the Board's finding that respondent interfered with, restrained, and coerced its employees in violation of Sec. 8 (a) (1) of the Act, we believe that the evidence establishes the following. Officials of respondent made various inquiries as to who was participating in the strike and union activities, and the general manager and foreman made statements which, reasonably construed, meant that union members would not be hired and that the plant would be closed if it were unionized.

Respondent contends that, in any event, the workers were not within the protection of the Act, because they voluntarily left their jobs without making a prior demand upon their employer. In *NLRB v. Washington Aluminum Co.*, 1962, 370 U. S. 9, 14, the Supreme Court stated, in language appropriate to this case, that "We cannot agree that employees necessarily lose their right to engage in concerted activities under Sec. 7 merely because they do not present

a specific demand upon their employer to remedy a condition they find objectionable". There, it was held sufficient that, prior to the walkout, there had been individual, spontaneous protests concerning the working conditions. In the present case, the evidence shows that, before the work stoppages began, individual workers had protested the wage situation and asked for a wage increase. Those protests and demands were sufficient notice to the respondent.[10]

We deal, finally, with respondent's attack upon the order itself, on the ground that it is "unintelligible and incapable of enforcement", because, as among the employees concerned, it draws no distinctions in terms of the types of jobs remaining open to them, whether the workers would have accepted the jobs that had not been permanently refilled, and whether they were qualified for those open jobs. There are not such distinctions in the types of jobs at respondent's plants as to require greater specificity. In addition, any necessary determination of these matters can be made at the compliance stage of the proceeding.

We have considered respondent's other arguments, and we are of the opinion that they do not justify denying enforcement of the order.

The Board's order will be

ENFORCED

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[10] Our decision in N.L.R.B. v. Ingram, 1968, 273 F. (2) 670, cannot be taken as requiring greater specificity in demands. The language to which respondent refers us dealt with the question of whether the Board had made out an actual discharge of the employees, in support of that portion of its order based upon an alleged discharge.

A true copy
Test: Edward W. Wadsworth, Clerk,
U. S. Court of Appeals, Fifth Circuit
By: CLARA R. JAMES
Deputy
New Orleans, Louisiana, March 29, 1963

(SEAL)

APPENDIX "C"

Order Denying Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 19553

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

MARYDALE PRODUCTS COMPANY, INC.,
Respondent.

Petition for Enforcement of an Order of the
National Labor Relations Board

(March 13, 1963)

On Petition to Rehear

Before HUTCHESON, WISDOM and GEWIN,

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be and it is hereby DENIED.

APPENDIX "D"

DECREE

United States Court of Appeals
For the Fifth Circuit

No. 19551

National Labor Relations Board,
Petitioner

versus

Marydale Products Company, Inc.,
Respondent

Before: Hutcheson, Wisdom and Gewin, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on October 20, 1961. The Court heard argument of respective counsel on November 13, 1962, and has considered the briefs and transcript of record filed in this cause. On January 3, 1963, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged, and decreed by the United States Court of Appeals for the Fifth Circuit that the [illegible] of the National

Labor Relations Board in said proceeding be enforced and that Respondent, Marydale Products Company, Inc., its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained.

ENTERED: March 28, 1963

(ORIGINAL FILED — MARCH 28, 1963)

APPENDIX "E"

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

The Decision and Order of the National Labor Relations Board is printed in Volume 1 of the Transcript of Record pp 140-158